

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

ADRIANNE COTTON,
Charging Party/Appellee,

HRB CASE NO. 0190142

-v-

FINAL AGENCY DECISION

MONTANA DEPARTMENT OF
CORRECTIONS,
Respondent/Appellant.

Charging Party, Adrienne Cotton, filed a complaint with the Department of Labor & Industry (Department), which alleged unlawful discrimination in employment on the basis of retaliation. Following an informal investigation, the Department determined that a preponderance of the evidence did not support Cotton's allegations and issued a Notice of Dismissal. Cotton subsequently filed an objection to the Department's decision with the Montana Human Rights Commission (Commission). The Commission considered the matter at its September 2019 hearing and ultimately issued an order remanding the case to the Office of Administrative Hearings for further proceedings.

The case then went before the Office of Administrative Hearings (OAH) of the Department of Labor & Industry, which held a contested case hearing on December 14-17, 2020, pursuant to Mont. Code Ann. § 49-2-505. The hearing officer issued a Decision on November 4, 2021, finding that discrimination did not occur and entering judgment in favor of Montana's Department of Corrections (Respondent).

Charging Party appealed the OAH decision to the Commission. The Commission considered the matter at its March 2022 hearing. After discussion, the Commission determined 2 of the hearing officer's conclusions of law were incorrect: that Cotton had failed to prove retaliation against her for protected activity, and that Respondent was the prevailing party. The

Commission then issued an order remanding the case to the OAH for further analysis of damages due to Cotton as a result of the DOC's actions. The hearing officer issued a Decision on Remand on October 26, 2022, in favor of the Charging Party.

On November 7, 2022, Respondent subsequently appealed the decision to the Commission. The Commission once again considered the matter on March 24, 2023. Isaac M. Kantor, attorney, appeared and presented oral argument on behalf of Ms. Cotton. Sarah Mazanec, attorney, appeared and presented oral argument on behalf of the DOC.

STANDARD OF REVIEW

The Commission may reject or modify the conclusions of law and interpretations of administrative rules in the hearing officer's decision but may not reject or modify the findings of fact unless the Commission first reviews the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. Mont. Code Ann. § 2-4-621(3). The Commission reviews conclusions of law for correctness and to determine whether the hearing officer misapplied the law to the facts of the case. The Commission reviews findings of fact to determine whether substantial evidence exists to support the particular finding. Admin. R. Mont. 24.9.123(4)(b); *Schmidt v. Cook*, 2005 MT 53, ¶ 31, 326 Mont. 202, 108 P.3d 511. "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. It consists of more than a mere scintilla of evidence but may be less than a preponderance." *State Pers. Div. v. DPHHS*, 2002 MT 46, ¶ 19, 308 Mont. 365, 43 P.3d 305.

DISCUSSION

Before the Commission, Respondent argues that OAH issued an unreasonable damage award that results in a windfall to Cotton. Specifically, Respondent argues that the hearing

officer applied a 2.5% growth rate, which was not based on the evidence in the record.

Respondent also argues that the hearing officer's emotional distress award was excessive.

Cotton, in turn, argues the damage award is correct and is based on substantial evidence and is within the discretion of the Hearing Officer. Cotton also argues the emotional distress award is supported by Cotton's unrefuted testimony in the record and within the Hearing Officer's discretion.

After careful consideration of the complete record and the argument presented by the parties, the Commission determines OAH erred in applying a 2.5% growth rate to the damage award. Testimony in the record indicates that had Cotton remained at DOC, her wages would have grown 1% due to a statutory increase. The Commission declines to adjust the emotional distress award and adopts the Hearing Officer's finding.

The Commission accepts the Hearing Officer's Conclusions of Law 1, 2, 3, 5, and 6 as drafted. The Commission finds Conclusion of Law 4 is clearly erroneous and amends Conclusion of Law 4 to reflect the 1% growth rate testified to by Lisa Grady at hearing.

The Hearing Officer determined Cotton is entitled to front pay damages for 89% of the year 2022. Cotton requested \$39,532 for 2022 for 61% of the year at hearing. Using that figure, the Commission determines that Cotton's wages for the entirety of 2022 would be \$64,807. 89% of \$64,807 results in a mitigated earnings of \$57,678 and lost earnings of \$59,274.

The total damage award is as follows:

Year	Annual Earnings	Part of year	Total Earnings@ 1% growth rate	Mitigating Earnings	Lost Earnings	Cumulative Total
2018	126,280	.10	12,628	-	12,628	12,628
2019	127,543	1.00	127,543	(5,516)	122,027	134,655

2020	128,818	1.00	128,818	(61,684)	67,134	201,789
2021	130,106	.84 Back pay	109,289	(53,109)	56,180	257,969
		.16 Front Pay	20,817	(10,116)	10,701	10,701
2022	131,407	.89 front pay	116,953	(57,678)	59,274	69,975
	644,153	4 years	516,046	(169,958)	327,944	327,944

Conclusion of Law 4 is therefore amended to read:

4. Cotton is entitled to compensatory damages. She is entitled to back pay in the amount of ~~\$274,436.00~~ \$257,969 and front pay in the amount of ~~\$88,617.00~~ \$69,975.

ORDER

IT IS HEREBY ORDERED, that the hearing officer decision is AMENDED as to the damage award. Therefore, the Commissions enters this modified order as its Final Agency Decision

1. Judgment is granted as set forth herein in favor of Adrienne Cotton against the Montana Department of Corrections.

2. Within ninety 90 days of the date of this decision, the Montana Department of Corrections shall pay Adrienne Cotton the sum of three hundred seventy seven thousand, nine hundred forty four (\$377,944) dollars, which includes the \$327,944 in damages and the \$50,000 emotional distress award.

3. The Montana Department of Corrections must consult with outside legal counsel with expertise in human rights law to ensure that its retaliation policies, practices, and procedures, and its policies, practices, and procedures with respect to responding to complaints of discrimination, including retaliation, are legally

sufficient. Additionally, this outside legal review shall include training of DOC employees on discrimination and retaliation. The planned review and training must be approved by the Montana Human Rights Bureau. The Montana Department of Corrections shall comply with all conditions of affirmative relief mandated by the Human Rights Bureau. Either party may petition the district court for judicial review of the Final Agency Decision. *Sections Mont. Code Ann. §§ 2-4-702 and 49-2-505.* This review must be requested within 30 days of the date of this order. A party must promptly serve copies of a petition for judicial review upon the Human Rights Commission and all parties of record. Mont. Code Ann. § *Section 2-4-702(2).*

DATED this 21st day of June 2023.



Peter M. Damrow, Chair
Human Rights Commission

CERTIFICATE OF SERVICE

The undersigned secretary for the Human Rights Commission certifies that a true and correct copy of the foregoing ORDER was mailed to the following by U.S. Mail, postage prepaid, on this 21st day of June 2023.

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